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No. 92-1756

IN THE

Supreme Court of the United States

October Term, 1992

THOMAS SEVER and RONALD MILLER,
Petitioners,

vs.

THOMAS C. FELICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER A COURT REVIEWING A MOTION FOR SUMMARY JUDGMENT MAY LOOK TO FACTS ESTABLISHED AT A SUBSEQUENT TRIAL AND NOT AVERRED BY THE NON-MOVING PARTY.

2. WHETHER A COURT REVIEWING A MOTION FOR SUMMARY JUDGMENT MUST ASSUME AS TRUE THE FACTS ALLEGED BY THE NON-MOVING PARTY.

PARTIES TO THE PROCEEDING

The Parties to this Proceeding are Petitioners, Thomas Sever and Ronald Miller, and Respondent, Thomas C. Felice. Plaintiff in the case below was Thomas C. Felice. Defendants in the case below were Thomas Sever, Ronald Miller, International Brotherhood of Teamsters Local Union No. 30, the County of Westmoreland, and the International Brotherhood of Teamsters. By agreement of the parties, the International Brotherhood of Teamsters was released as a party prior to trial. The dismissal of the Complaint with respect to the County of Westmoreland was not appealed to the Court of Appeals.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Thomas Sever and Ronald Miller, respectfully request that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit, entered in the above-captioned proceeding on March 11, 1992.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is reprinted in the Appendix hereto at p. A1, *infra*. The Memorandum Opinion of Judge Cohill of the United States District Court for the Western District of Pennsylvania is reprinted in the Appendix hereto at p. A25. The Findings of Fact and Conclusions of Law of Judge Lewis is reprinted in the Appendix hereto at p. A33.

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Rule 56 of the Federal Rules of Civil Procedure, Summary Judgment, and 29 U.S.C. §185.

STATEMENT OF THE CASE

Thomas C. Felice (hereinafter referred to as "Felice") originally commenced this action by a Writ of Summons on December 16, 1988, in the Court of Common Pleas of Westmoreland County, Pennsylvania. An eight Count Complaint was served on defendants on May 2, 1989 (R. 11a).

On May 22, 1989, the action was removed to the United States District Court for the Western District of Pennsylvania at Civil Action No. 89-1183 (R. 8a).

On October 30, 1988, Chief Judge Cohill entered an Order dismissing the International Brotherhood of Teamsters as a defendant.

On November 21, 1989, Chief Judge Cohill entered an Order granting defendant, Westmoreland County's, Motion to Dismiss Felice's claim for punitive damages but denied said Motion with respect to the other Counts in the Complaint.

On May 22, 1991, Chief Judge Cohill granted defendants' Motions for Summary Judgment with respect to Counts I, III and V of the Complaint but denied the Motions with respect to the remaining Counts (R. 114a-120a).

The case was reassigned to the Honorable Timothy K. Lewis for non-jury trial which commenced on January 29, 1992.

At the conclusion of Felice's case, Judge Lewis granted defendants' Motion for Judgment as a Matter of Law with respect to the civil rights causes of action which were contained in Counts IV and VII of the Complaint

(R. 94a-95a). Since those were the only Counts remaining with respect to the County of Westmoreland, they no longer participated in the trial.

The duty of fair representation claim against General Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 30 (hereinafter "Local 30"), Thomas Sever (hereinafter "Sever") and Ronald Miller (hereinafter "Miller"), was the only remaining claim (R. 95a).

On March 11, 1992, Judge Lewis issued Findings of Fact and Conclusions of Law with respect to this claim (R. 122a-134a). By Order of same date, Judge Lewis found in favor of these defendants (R. 135a).

Felice filed a Notice of Appeal with respect to Judge Lewis' March 11, 1992, Order but not with respect to the granting of the Rule 52 Motion for Judgment as a Matter of Law on the civil rights claims. Felice also appeals from Chief Judge Cohill's granting of the Motion for Summary Judgment in favor of defendants Sever and Miller.

On February 8, 1993, the United States Court of Appeals for the Third Circuit affirmed the Findings of Judge Lewis but reversed and remanded with respect to Judge Cohill's Order of March 11, 1992, granting Sever and Miller's Motion for Summary Judgment regarding the state law claims.

Sever and Miller filed a timely Petition to the Court of Appeals for rehearing *en banc* which was denied on March 3, 1993.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision that a Court Reviewing a Motion for Summary Judgment May Look to Facts not Averred by the Non-Moving Party is Contrary to This Court's Long-Standing Precedent and is in Conflict with Decisions of Other Courts of Appeal.

It has long been recognized by this Court that the plain language of Rule 56(c) mandates the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case. *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In reviewing the Motion for Summary Judgment, the Court of Appeals compared the District Judge's decision on the Motion for Summary Judgment and another District Judge's decision at trial. The Court found the two Decisions to be inconsistent. The Court of Appeals stated at p. 22 of the Slip Opinion:

> When Judge Cohill granted summary judgment on the state claims, he did so on the ground Felice was covered by a collective bargaining agreement between Local 30 and the County of Westmoreland. However, as we noted in our preceding discussion, after trial Judge Lewis found that Felice was not a member of the collective bargaining unit covered by the County. There is thus a patent inconsistency between the two decisions. The status of Felice as an employee *vel non* of the County of Westmoreland was a disputed issue of fact because the defendants denied that Felice had become such an employee. Therefore, summary judgment could not properly have been predicated on that fact, and the trial court's finding must govern.

Any inconsistency between the two District Court decisions was created by Felice's inconsistent pleading and alteration of his legal theory during the pendency of the case. The Court of Appeals improperly expanded its review to include a finding of fact at the subsequent trial. The Court of Appeals' decision allows a reviewing court to consider facts which are not established or even alleged by the non-moving party. The Court of Appeals' Decision suggests that a court reviewing a proper entry of Summary Judgment against a party who has failed to make a showing sufficient to establish the existence of an element essential to that party's case may consider facts raised at the subsequent trial. Moreover, the Decision suggests that a District Judge's Decision to properly grant Summary Judgment based on the facts established by the non-moving party may be overturned based on facts not presented before the District Court. This decision is in direct conflict with this Court's precedent.

The Court of Appeals' decision that a court reviewing a Motion for Summary Judgment may look to facts not averred by the non-moving party is in conflict with decisions of other Courts of Appeal. The Second Circuit has recently held that "the non-moving party must, under Federal Procedure 56, demonstrate to the court the existence of a genuine issue of material fact." (Citations omitted). *Lendino v. Trans Union Credit Information Co.*, 970 F.2d 1110 (2d Cir. 1992).

The Fifth Circuit has recently decided a case in conflict with the decision of the Court below. *Solo Serve Corp. v. Westowne Associates*, 929 F.2d 160 (5th Cir. 1991). In *Solo Serve*, the court stated that the non-moving party "has the burden of insuring that the evidence presented is sufficient to establish a genuine issue of material fact." *Solo Serve*, at 164.

The Seventh Circuit has also decided a case in conflict with the decision of the Court below. *Fitzpatrick v. Catholic Bishop of Chicago*, 916 F.2d 1254 (7th Cir. 1990). In *Fitzpatrick*, the court citing *Celotex Corp.*, stated:

> Where the non-moving party fails to make a showing sufficient to establish the existence of an essential element on which he would bear the burden of proof at trial, summary judgment should be entered against him.

Fitzpatrick, at 1256.

A Petition for a Writ of Certiorari should be granted to address this important federal question which was decided by the Court of Appeals in a way which is in conflict with the applicable decisions of this Court. This Court should also grant certiorari to resolve a conflict in the circuits as to whether it is proper for a reviewing court to reverse the district court's granting of summary judgment based on the subsequent finding of fact at trial. Only prompt action by this Court will effectively resolve the confusion within the Third Circuit.

II. The Court of Appeals' Decision Violated this Court's Precedent and is in Direct Conflict with Decisions of Other Courts of Appeal by Not Assuming as True the Facts Alleged by the Non-Moving Party.

The Court of Appeals could not have reached the conclusion that there was a genuine issue as to a material fact if the Court confined its review to the test that the district court was required to apply, *i.e.*, to assume as true the facts alleged by the non-moving party. This Court has stated in *Kodak v. Image Technical Services,* 504 U.S. _____, 119 L.Ed.2d 265 (1992):

> Because this case comes to us on Petitioner Kodak's Motion for Summary Judgment, the evidence of Respondents is to be believed, and all justifiable inferences are to be drawn in their favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The District Judge correctly assumed as true the facts alleged by the non-moving party, Felice. In his action against the Union and Union officials, Felice alleged that he was an employee for purposes of bringing an action for breach of the Union's duty of fair representation. The District Judge assumed as true the fact that Felice was an employee and properly granted defendant's Motion for Summary Judgment on the state claims against the Union officials under 29 U.S.C. §185. Section 185 states:

> Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

29 U.S.C. §185(b).

If Felice's allegations are assumed as true, he is barred under Section 185 from bringing an action against individual union officials acting in their capacity. Therefore, there is no genuine dispute as to a material fact, and the defendant is entitled to be granted summary judgment as a matter of law.

A number of Courts of Appeal have held that in a Motion for Summary Judgment the court is to assume as true the facts alleged by the non-moving party. In *Kowaleviocz v. Local 1333*, 942 F.2d 285 (4th Cir. 1991), the Fourth Circuit stated:

> All factual contentions are to be considered in a light most favorable to the non-moving party, who is to be given the benefit of all favorable legal theories invoked by the evidence as considered.

Kowaleviocz, at 288.

The Fifth Circuit has recently stated that:

> Because Westowne made the Motion, we must view the evidence in the light most favorable to Solo Serve and draw all reasonable inferences in favor of Solo Serve.

Solo Serve Corp. v. Westowne Associates, 929 F.2d 160, 164 (5th Cir. 1991).

In *Kraus v. Sobel Corrugated Containers, Inc.*, 915 F.2d 227 (6th Cir. 1990), the court stated:

> The court is to construe the evidence and all inferences to be drawn from it in the light most favorable to the non-moving party.

Kraus, at 229.

The Eleventh Circuit is another Court of Appeals that follows the principle that all factual disputes must be resolved in favor of the non-moving party. *Tittle v. Jefferson County*, 966 F.2d 606, 610 (11th Cir. 1992).

The Third Circuit has substantially departed from the well-settled principles governing summary judgment. The Court of Appeals failed to properly apply the test the District Court was required to apply. The Third Circuit failed to assume as true the facts alleged by the non-moving party. The Court of Appeals' decision is contrary to this Court's long-standing precedent and is in conflict with decisions of other Courts of Appeal.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Third Circuit Filed February 8, 1993

Filed February 8, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-3211

THOMAS C. FELICE,

Appellant

v.

THOMAS SEVER, individually and in his capacity as President of Teamsters Local Union No. 30; RONALD MILLER, individually and in his capacity as Business Agent of Teamsters Local Union No. 30; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA LOCAL UNION No. 30; THE COUNTY OF WESTMORELAND; and THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 89-1183)

Argued November 2, 1992

Before: SLOVITER, *Chief Judge*, STAPLETON and LAY*, *Circuit Judges*

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* Honorable Donald P. Lay, Senior Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

(Opinion Filed: February 8, 1993)

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OPINION OF THE COURT

SLOVITER, *Chief Judge*.

Thomas C. Felice, the plaintiff in the district court, appeals from two orders of the district court. One is the entry of judgment after a non-jury trial in favor of defendant union and two of its officers on Felice's breach of the duty of fair representation claim brought under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169 (1988). The other is the earlier grant of summary judgment for the two union officers in their individual capacities on Felice's state law claims. This appeal requires us to examine closely the parameters of an unfair representation claim and the scope of the statutory immunity for individual union officers. We have jurisdiction under 28 U.S.C. § 1291 (1988).

I.

FACTS AND PROCEDURAL HISTORY

The facts relevant to this appeal are not disputed here and are taken primarily from the district court's findings of fact. Before any of the events relevant to this case, plaintiff Thomas C. Felice was a member of the defendant union, Teamsters, Chauffeurs, Warehousemen and Helpers of America Local Union No. 30 (Local 30 or union), and was employed at M & G Convoy, Inc. (M & G) where he held the position of union shop steward. Local 30 is a "labor organization" within the meaning of the NLRA, *see* 29 U.S.C. § 152(5) (1988), and is the exclusive bargaining representative of the collective bargaining unit in which Felice was employed at M & G. M & G is an "employer" within the meaning of the NLRA. *See id.* § 152(2).

In October 1987, Felice ran unsuccessfully for union office. The winning slate of candidates included defendant Thomas Sever, the President of Local 30, and defendant Ronald Miller, the Business Manager. Both assumed these offices in January 1988. Thereafter, Sever instituted a campaign of retaliation against Felice, which ranged from "keeping a tight rein on Felice's participation in union meetings" to "attempting to manipulate steward elections." App. at 123. As a result of Sever's efforts, Felice lost his position as shop steward at M & G and the related "super-seniority." Consequently, Felice was laid off from his position at M & G in July 1988.

According to the union by-laws, a union member who has not been employed in a collective bargaining unit represented by the union for a period of six months is issued an honorable withdrawal card, which terminates active membership in the union and deprives the member

of the right to seek union office. On January 31, 1989, Felice was issued an honorable withdrawal card by Local 30 because he had not obtained employment in another bargaining unit represented by Local 30.

The critical conduct for purposes of this appeal occurred during the six-month period from the time of Felice's layoff from M & G to the time he was issued the honorable withdrawal card. On November 14, 1988, Felice applied for a job with the Westmoreland County Park Police. The County of Westmoreland is a political subdivision of the Commonwealth of Pennsylvania. Pursuant to a collective bargaining agreement entered into under the Pennsylvania Public Employe Relations Act (PERA),[1] 43 Pa. Cons. Stat. Ann. § 1101.101-1101.2301 (Purdon 1991 & Supp. 1992), Local 30 was the exclusive bargaining representative for the collective bargaining unit that included the Park Police of the defendant County of Westmoreland.

The County Commissioner, Fey Vidmer, arranged to hire Felice for a position with the Park Police, contingent on the receipt of salary reimbursement from the Private Industry Council of Westmoreland/Fayette, Inc. (PIC), an entity established pursuant to the Job Training Partnership Act of 1982, 29 U.S.C. §§ 1501-1781 (1988 & Supp. II 1990). The PIC could reimburse the County for one-half of Felice's wages earned

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1. The Pennsylvania Public Employe Relations Act applies to all "public employers," including the "Commonwealth of Pennsylvania [and] its political subdivisions," as long as the employer is not otherwise covered by the NLRA or the Pennsylvania Labor Relations Act. *See* 43 Pa. Cons. Stat. Ann. § 1101.301 (1991). The County of Westmoreland is a "public employer" covered by PERA.

during a three-month training period. Vidmer's intention was to hire Felice only if the County received this funding. Vidmer completed all of the necessary paperwork on his part except for setting an effective date for Felice's hiring.

In order to obtain PIC funding, the County needed Local 30 to sign a Union Concurrence Form approving the hiring of Felice. The Chief of the Park Police, Michael Corsaro, sent the Union Concurrence Form to Miller in mid-November 1988. Miller showed the form to Sever, who directed that it be sent to the union's attorney for review. This procedure deviated from the past practice whereby the business manager would sign similar forms without approval by the union's president or attorney.

Beginning in late November 1988 through early December 1988, Felice inquired why his application for employment with the County of Westmoreland had not yet been approved; Miller offered a variety of excuses in response. In late December 1988, the union's attorney approved signing the Concurrence Form if the County assured the union that hiring Felice would not result in the layoff of any bargaining unit employees. In early January 1989, Miller sought that assurance from Corsaro. On February 6, 1989, after Felice had been issued an honorable withdrawal card from Local 30, Corsaro responded to Miller's earlier request by a memorandum to Sever stating that the County no longer needed the union's signature on the Concurrence Form as it believed that a recent change in state law prevented it from hiring Felice because he had not completed and was not enrolled in municipal

police training.[2] Eventually Felice obtained other employment, but it was not in a bargaining unit represented by Local 30. During the period between Felice's layoff and the issuance of the withdrawal card, Sever continued to express retaliatory intentions toward Felice, stating on several occasions that Felice would "never work in Local 30 again." App. at 123.

Felice originally filed this suit in Pennsylvania state court naming five defendants: Sever, Miller, Local 30, the County of Westmoreland, and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (International Union). Of the eight counts in the complaint, five are relevant to this appeal.[3] Counts I, III, and V alleged that Sever and Miller had violated state law by defaming Felice and interfering with his employment opportunities with the County of Westmoreland. Count II alleged that Sever, Miller, and Local 30 (often referred to jointly as Local 30) had breached the duty of fair representation, primarily by refusing to sign the Union Concurrence Form. Count VIII sought punitive damages for the intentional misconduct of any of the defendants.

Defendants removed this action to federal court pursuant to 28 U.S.C. § 1441 (1988 & Supp. II

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2. The record indicates that the County was in error in its belief as to state law.

3. Felice voluntarily dismissed all claims against the International Union at an early stage of the proceedings. Following the conclusion of plaintiff's case at trial, the district court entered judgment for the County of Westmoreland and Local 30 on the claims brought under 42 U.S.C. §§ 1983 and 1985 (1988). Felice does not appeal either of these orders.

1990). Thereafter, defendants Sever, Miller, and Local 30 moved for summary judgment. The district court (Chief Judge Cohill) denied summary judgment on the unfair representation claim asserted against Local 30 and against Sever and Miller in their official capacities. It granted summary judgment for Sever and Miller on all of Felice's claims asserted against them as individuals. The court held that under section 301(b) of the Labor Management Reporting Act (LMRA), 29 U.S.C. § 185(b) (1988), Sever and Miller were immune from liability on the claim for breach of the duty of fair representation. The court commented that the unfair representation claim against them in their official capacities was adequate to address their potential liability. The court also granted summary judgment for the individuals on the state law claims on the ground of immunity, stating that the relevant conduct had occurred while Felice was covered by the collective bargaining agreement with the County, and therefore these claims as well were foreclosed by section 301(b). Felice appeals only from the summary judgment on the state law claims.

The case was then transferred to Judge Lewis for a bench trial on the remaining claims. At the conclusion of the trial, the district court entered judgment for the defendants on Felice's claim that Local 30 had breached its duty of fair representation by interfering with Felice's employment with the County of Westmoreland,[4] holding that Local 30 did not owe Felice a duty of

4. As noted in note 3, *supra*, at the conclusion of Felice's case, the district court had granted the defendants' Rule 52(c) motion as to several of Felice's claims.

fair representation in its conduct with respect to the Union Concurrence Form.

Felice is appealing the entry of judgment for defendants Sever, Miller, and Local 30 on his breach of the duty of fair representation claim, and the grant of summary judgment for individual defendants Sever and Miller on his state law claims.

II.

SUBJECT MATTER JURISDICTION

At the outset, we must consider defendants' suggestion that the district court lost subject matter jurisdiction over this case when the court dismissed his civil rights claim against the County of Westmoreland and Felice abandoned his claim for breach of the duty of fair representation under federal law against Local 30 based on conduct that occurred while Felice was employed at M & G. Defendant concedes that the inclusion of these claims in the complaint provided an adequate basis for removal of the action from state to federal court. The fact that the federal claims that were the basis for the removal were unsuccessful or were dropped during subsequent proceedings does not deprive the district court of jurisdiction, unless the federal claims were "insubstantial on their face." *Hagans v. Lavine*, 415 U.S. 528, 542 n.10 (1974) (quotation omitted); *see also Lunderstadt v. Colafella*, 885 F.2d 66, 69-70 (3d Cir. 1989). They were not insubstantial in that sense, and thus the district court never lost subject matter jurisdiction. Moreover, it developed that Felice was in fact asserting a breach of fair representation claim against Local 30 grounded on the NLRA which was

sufficient to withstand dismissal under Rule 12(b)(1).

III.

DISCUSSION

A.

Duty of Fair Representation

Felice's principal challenge is to the district court's holding that Local 30, Sever, and Miller did not owe him a duty of fair representation under the National Labor Relations Act. Any claim that Felice may have asserted for breach of the duty of fair representation under state law was based on Felice's initial contention that he was an employee of the County of Westmoreland. Felice does not dispute the district court's implicit finding that he was not an employee of the County of Westmoreland. Thus, Felice's argument on appeal is limited to the narrow proposition that because he was a union member, Local 30 owed him a duty of fair representation under federal law in its dealings with the County of Westmoreland regarding his potential employment. Felice's claim raises a legal question over which we have plenary review.

The NLRA provides for the certification of a union as the exclusive bargaining representative "in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." 29 U.S.C. § 159(a) (1988). It has now been well established that a union certified as an exclusive bargaining representative has a correlative duty of fair representation. In *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), the seminal case

on the statutory duty of fair representation, the Supreme Court reviewed the history of its recognition of such a duty, beginning with cases under the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1988), alleging racial discrimination by unions, *see Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 202-04 (1944); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 213 (1944), and extended shortly thereafter to the NLRA, *see Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-38 (1953).

Jurisdiction over a claim that a union has breached its duty of fair representation is based on 28 U.S.C. § 1337(a) (1988) (covering "any civil action or proceeding arising under any Act of Congress regulating commerce"), *see Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 83 (1989), whereas an employee's claim directly against the employer for breach of a collective bargaining agreement after the union failed to process the grievance is filed under section 301(a) of the LMRA, 29 U.S.C. § 185(a) (1988).[5]

Ordinarily, an employee files a claim against the union alleging breach of the duty of fair representation together with a claim against the employer alleging breach of the collective bargaining agreement in a "hybrid" section 301/duty of fair representation suit. In the

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5. *See* Angst v. Mack Trucks, Inc., 969 F.2d 1530, 1536 n.5 (3d Cir. 1992) (section 301(a) provides jurisdiction over "all claims that are substantially dependent upon analysis of the terms of a collective bargaining agreement, regardless of whether the claim is brought by a union or directly by an employee") (citing Allis-Chalmers v. Lueck, 471 U.S. 202 (1985)).

"hybrid" suit, the plaintiff will have to prove that the employer breached the collective bargaining agreement in order to prevail on the breach of duty of fair representation claim against the union, and vice versa. *See United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 66-67 (1981) (Stewart, J., concurring in the judgment). Thus, the claims are "inextricably interdependent." *Id.*; *see also DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164-65 (1983).

Nonetheless, the claims are not inseparable. A plaintiff who has a viable "hybrid" claim against both the employer and the union may opt to bring only the section 301 claim against the employer or the breach of duty of fair representation claim against the union. *See DelCostello*, 462 U.S. at 165. Either claim standing alone can be brought in federal court because each has an independent jurisdictional basis. *Id.*

Defendants argue that because the County of Westmoreland is a "political subdivision" not subject to section 301, Felice cannot maintain his duty of fair representation claim against Local 30. We have previously held that the term "employer" in the NLRA excludes "any State or political subdivision thereof," *see* 29 U.S.C. § 152(2), and therefore the federal courts lack subject matter jurisdiction over a duty of fair representation claim brought by an employee of such an entity. *See Manfredi v. Hazleton City Auth.*, 793 F.2d 101, 102, 104 n.5 (3d Cir. 1986) (per curiam); *Crilly v. Southeastern Pa. Transp. Auth.*, 529 F.2d 1355, 1363 (3d Cir. 1976). Both cases, however, were "hybrid" claims in which the unfair representation claim was based on the union's failure to pursue a grievance on behalf of the plaintiff employee

against the employer political subdivision. In such a scenario, the absence of federal jurisdiction over the claim against the employer necessarily means there is no basis for federal jurisdiction over the employee's unfair representation claim.

The Supreme Court has made clear that its reasoning in *Vaca v. Sipes* about the relationship between the unfair representation claim against the union and the section 301 claim against the employer for breach of a collective bargaining agreement "in no way implies . . . that a fair representation action *requires* a concomitant claim against the employer for breach of contract." *See Breininger*, 493 U.S. at 80 (emphasis in original). Thus, in *Breininger*, the Court held that a union's administration of a hiring hall is subject to the duty of fair representation even though there is no possible breach of contract claim against the employer. *Id.* at 87-89. Similarly, a union's negotiation of a collective bargaining agreement is subject to the duty of fair representation, even though again there could be no possible breach-of-contract action against the employer. *See, e.g., Steele*, 323 U.S. at 195, 202-03 (union breached duty of fair representation by entering into a collective bargaining agreement that discriminated against black firemen in employment, promotion, and seniority); *see also Nedd v. United Mine Workers of Am.*, 556 F.2d 190, 200 (3d Cir. 1977) (union that undertakes to bargain over future retirees' benefits owes those retirees a duty of fair representation), *cert. denied*, 434 U.S. 1013 (1978).

Duty of fair representation claims against a union have been extended to a variety of other contexts in which there was no basis for a claim

against the employer. For example, in *Retana v. Apartment, Motel, Hotel & Elevator Operators Union, Local No. 14*, 453 F.2d 1018, 1022 n.6, 1023 (9th Cir. 1972), the court held that a union member's claim that the union failed to provide Spanish-speaking members with a bilingual liaison to the union and a copy of the collective bargaining agreement in Spanish, failed to explain to those members their rights and responsibilities as union members, and failed to seek the establishment through collective bargaining of a bilingual supervisory system adequately alleged a breach of the duty of fair representation because each of these actions "concerne[d] matters related to the negotiation or administration of the collective bargaining agreement."

Finally, we have held that a union has a duty not to deliberately misrepresent its bargaining efforts and positions in order to induce ratification of a collective bargaining agreement, and the breach of that duty gives rise to an unfair representation claim. *See Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1018-20 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977); *see also Anderson v. United Paperworkers Int'l Union*, 641 F.2d 574, 578 (8th Cir. 1981).

The independence of a duty of fair representation claim against the union from a breach of the collective bargaining agreement claim against the employer does not mean that federal law provides a forum for every complaint the union member may have against the union. The parameters of a viable duty of fair representation claim must be gleaned from the function that such a claim serves.

The duty of fair representation exists because the NLRA deprives "individuals in the [collective bargaining] unit of the ability to bargain individually or to select a minority union as their representative" and therefore it is necessary to ensure that individuals are not "deprived of all effective means of protecting their own interests . . . ." *DelCostello*, 462 U.S. at 164 n.14; *see also Breininger*, 493 U.S. at 86-87 (duty exists because "'the national labor policy vested unions with power to order the relations of employees with their employer'") (quoting *N.L.R.B. v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967)); *Masy v. New Jersey Transit Rail Operations, Inc.*, 790 F.2d 322, 327-28 (3d Cir. 1986) (duty is a "counterbalance to the union's position as exclusive bargaining representative"). It has been described by the Supreme Court as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca v. Sipes*, 386 U.S. at 182. It requires unions to "serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* at 177.

As is evident from the foregoing, the duty of fair representation is inextricably linked to the union's status as exclusive bargaining representative in the collective bargaining process or in the administration of rights under a collective bargaining agreement. For example, in *Breininger* the union's obligation to run the hiring hall arose out of a provision of the collective bargaining agreement. As the Supreme Court explained:

> Only because of its status as a Board-certified bargaining representative and by virtue of the power granted to it by the collective-bargaining agreement does a union gain the ability to refer workers for employment through a hiring hall. Together with this authority comes the responsibility to exercise it in a nonarbitrary and nondiscriminatory fashion, because the members of the bargaining unit have entrusted the union with the task of representing them. . . . The key is that the union is administering a provision of the contract, something that we have always held is subject to the duty of fair representation.

493 U.S. at 87-88.

The thread that links *Breininger* and other duty of fair representation cases that are not "hybrid" section 301 cases is that the union is acting in its role as exclusive bargaining representative in the collective bargaining process.[6] Because Felice was never employed by the County of Westmoreland and therefore he was never covered by the collective bargaining agreement, he has no section 301 breach of contract claim against the County of Westmoreland and no duty of fair representation claim against the union based on that contract. Thus, Felice's claim falls outside the

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6. In Chavez v. United Food & Commercial Workers International Union, 779 F.2d 1353, 1357-58 (8th Cir. 1985), the court considered whether the duty of fair representation applied to a union that was not in fact the exclusive bargaining representative. Although the court held that it did, it was only because the union had held itself out as the exclusive bargaining representative to the employer and the employees with the intent of creating reliance by the striking members. *Id.* at 1356-57.

category of "hybrid" claims where the duty of fair representation most often arises.

Nor is this case comparable to those cases imposing a duty of fair representation on unions in the negotiation or administration of collective bargaining agreements. Felice's claim is limited to Local 30's failure to sign the Union Concurrence Form submitted to it by the County of Westmoreland. Local 30 was neither negotiating nor administering a collective bargaining agreement in that context.

Felice asserts, however, that the action of Local 30 in refusing to sign the Union Concurrence Form approving Felice's employment with the County of Westmoreland is subject to the duty of fair representation because Felice was a member of Local 30, which was the exclusive bargaining representative for the County of Westmoreland. However, the duty of fair representation that Felice seeks to impose on Local 30 is not linked in any fashion to its role as the exclusive bargaining representative on Felice's behalf, because Felice was not, and had never been, a member of that unit.

The requirement that Local 30 sign the Union Concurrence Form approving Felice's employment with the County of Westmoreland did not arise out of Local 30's position as exclusive bargaining representative for the County under the federal labor laws, but arose out of a separate federal law that authorized federal funding for certain job training programs, conditioned on the approval of the union that represented that particular bargaining unit. *See* 29 U.S.C. § 1553(b)(2)(1988). It was merely happenstance that Felice had been a member of Local 30 by virtue of his earlier

employment for a different employer. The need for Local 30 to concur in Felice's employment by the County would have been equally applicable to any prospective employee, whether or not s/he had previously been a Local 30 member. Local 30's power over Felice's employment did not stem from its position as his exclusive bargaining representative, and accordingly the duty of fair representation is inapplicable. Thus, even if we assume that Local 30's delay in approving the Union Concurrence Form was in retaliation for his protected union activity, the duty of fair representation claim is not the vehicle by which such action can be redressed.[7]

Therefore we will affirm the judgment of the district court in favor of defendants Local 30, Sever, and Miller as regards their alleged breach of the duty of fair representation.

B.

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7. The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. § 401 *et seq.* (1988) is the primary protection for individual union members against the power of the union. For example, section 101 of the LMRDA protects a union member's right to "express any views, arguments, or opinions; and to express at meetings of the labor organization his views upon candidates in an election of the labor organization," 29 U.S.C. § 411(a)(2) (1988), and section 102 provides that any person whose rights are infringed by the labor organization can bring an action against it, *id.* § 412. Section 609 makes it unlawful for a union or representative to "fine, suspend, expel, or otherwise discipline any of its members" for the exercise of rights protected under the LMRDA. *Id.* § 529. At oral argument, Felice acknowledged that he could have brought a LMRDA claim based on the union officers' conduct at issue in this case, but that he had not, instead limiting his LMRDA claim to a challenge to the union rule precluding discharged members from running for office.

Individual Liability of Union Officers

We turn next to Felice's challenge to the grant of summary judgment for defendants Sever and Miller on Felice's state law claims. In his complaint, Felice asserted a number of state law claims against Sever and Miller, ranging from defamation during a meeting of union members and at other unspecified times to interference with Felice's contract with the County of Westmoreland.[8] The district court granted summary judgment for defendants Sever and Miller on Felice's state law claims on the ground that section 301(b) of the LMRA provided them immunity from such claims. The court viewed the applicable Supreme Court precedent as "foreclose[ing] state-law claims, however inventively cloaked, against individuals acting as union representatives within the ambit of the collective bargaining process." App. at 118-19.

The district court specifically referred only to the defamation claim. It held that the "[d]efamatory

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8. The nature of the state law claims asserted is ambiguous. In addition to defamation and interference with a contractual relationship, the complaint refers to "other [undefined] state law tort claims." We treat all of these claims together because no distinction is necessary for our purposes at this time, and the district court made none.

Felice's appellate brief is limited to a discussion of the state law claims relating to defendants' conduct in connection with the County of Westmoreland. Thus, Felice has abandoned any potential state law claims against these defendants arising out of their conduct while Felice was employed at M & G. *See* Brenner v. Local 514, United Bhd. of Carpenters, 927 F.2d 1283, 1298 (3d Cir. 1991) (waiver of argument not included in appellate brief).

We do not consider the merits of the state law claims, because that issue was not addressed in the summary judgment order under review.

remarks allegedly published to Westmoreland County personnel were made . . . after County officials had authorized [Felice's] hiring and he became covered by the collective bargaining agreement between the Local 30 and the County"; that therefore the remarks "fall within the ambit of the collective bargaining process"; and that section 301(b) immunity applies. App. at 119. We exercise plenary review over a district court's grant of summary judgment. *Public Interest Research Group v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 76 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 1018 (1991).

Section 301(b) provides that "[a]ny money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets." 29 U.S.C. § 185(b) (1988).

Notwithstanding the literal language of this section which merely exempts union agents and members from personal liability for judgments against the union, in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), the Supreme Court gave the statute a broader reading. The purpose of section 301(b), the Court explained, was to ensure that "only the union was to be made to respond for union wrongs, and that the union members were not to be subject to levy." *Id.* at 247-48. Therefore, the Court held that it would discharge the duty imposed on it by Congress to formulate the federal law to govern section 301(a) suits by holding that even when the claim is only against individual union members, "[t]he national labor policy requires . . . that when a union is liable for

damages for violation of the no-strike clause, its officers and members are not liable for these damages." *Id.* at 249.

Thereafter, in *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 417 (1981), the Court considered the issue reserved in *Atkinson*, 370 U.S. at 249 n.7, *i.e.*, whether an employer may bring a claim for damages under section 301(a) against individual union members acting in their personal and nonunion capacity for breaching the no-strike clause in a collective bargaining agreement by participating in a wildcat strike that was not authorized by the union. The Court reasoned that the "penumbra" of section 301(b) immunity, in light of the legislative history, "establishes that Congress meant to exclude individual strikers from damages liability, whether or not they were authorized by their union to strike." *Reis*, 451 U.S. at 415. The Court so held notwithstanding its recognition that the employer would not have a claim against the union, and thus would have no monetary redress. *Id.* at 416 n.18.

Sever and Miller view the immunity extended by section 301(b) as covering all "conduct related to their actions as Union officers." Appellees' Brief at 34. We note, preliminarily, that it is questionable whether the campaign that Sever instituted against Felice in retaliation for running for union office could be viewed as official action. We need not decide that issue because the legal principle as enunciated by Sever and Miller is too broad.

Both *Atkinson* and *Reis* applied the individual immunity to individuals covered by a collective bargaining agreement. In *Crilly*, we recognized that one consequence of finding that a collective bargaining agreement with a political subdivision

was not covered by section 301(a) was that "the provision in section 301(b) protecting the members of the Local from personal liability does not apply, and that state law could impose such liability." 529 F.2d at 1361. In other words, we enunciated the principle, albeit in dictum, that individual immunity is a corollary to a section 301 bargaining agreement.

We followed that principle without citation to *Crilly* in our subsequent decision in *Kerry Coal Co. v. United Mine Workers*, 637 F.2d 957 (3d Cir.), *cert. denied*, 454 U.S. 823 (1981), upholding a state law damages verdict against individual union officers. Kerry, a coal producer who had no bargaining relationship with the unions that picketed its establishment, won a jury verdict against the unions and individual members and officers for illegal secondary picketing, harassment of employees, and destruction of equipment. On review, we upheld the pendent state law damage verdicts against the individual defendants for intentional interference with contractual relationships. *Id.* at 964-66.

Kerry was analyzed in *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120*, 647 F.2d 372, 377 (3d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982), where the employer, a newspaper publisher, sued the unions for breach of contract and individual members for tortious interference with a contract for establishing a competing newspaper during a strike. We held, in reliance on *Atkinson*, that under section 301(b), union members could not be liable for tortious interference with a contract "[w]here the individual member liability sought to be imposed gr[ew] out of activities on behalf of a union with which the

plaintiff has a bargaining relationship . . . ." *Id.* We distinguished *Kerry*, explaining that in that case the employer plaintiff had neither a bargaining relationship nor a contractual relationship with the union to which the individual members belonged. We noted that *Kerry* was not governed by *Atkinson*, because *Atkinson* did not deal "with the liability of individual members of labor organizations with which the employer did not have a contractual relationship." *Id.* at 377.

All of the cases cited applying section 301(b) immunity to individual union officers or members have done so where there was a collective bargaining contract or relationship out of which the damage claim arose. *See, e.g., Evangelista v. Inlandboatmen's Union*, 777 F.2d 1390, 1400 (9th Cir. 1985) (immunity extends to suits against union officers for breach of the duty of fair representation, if suit is brought in the context of a hybrid section 301/duty of fair representation claim); *see also Bey v. Williams*, 590 F. Supp. 1150, 1154-55 (W.D. Pa. 1984) (same), *aff'd without opinion*, 782 F.2d 1026 (3d Cir. 1986); *see also Republic Steel Corp. v. United Mine Workers*, 570 F.2d 467, 478 (3d Cir. 1978).

When Judge Cohill granted summary judgment on the state claims, he did so on the ground Felice was covered by a collective bargaining agreement between Local 30 and the County of Westmoreland. However, as we noted in our preceding discussion, after trial Judge Lewis found that Felice was not a member of the collective bargaining unit covering the County. There is thus a patent inconsistency between the two decisions. The status of Felice as an employee *vel non* of the County of Westmoreland was a disputed issue of

fact because the defendants denied that Felice had become such an employee. Therefore, summary judgment could not properly have been predicated on that fact, and the trial court's finding must govern.

Although Local 30 was the union representative for employees of the County of Westmoreland, that was not, as we previously noted, by virtue of the NLRA but by virtue of state law. Indeed, Judge Lewis specifically found, "Local 30's signature on a concurrence form was not required by virtue of the collective bargaining agreement between the County and Local 30" but by virtue of the federal law covering PIC funding. *See* 29 U.S.C. § 1553(b)(2).

We conclude that a state law claim brought against a union officer that does not implicate a collective bargaining agreement covered by section 301(a) does not give rise to section 301(b) immunity. When section 301(a) is inapplicable, the immunity provided by section 301(b) is also inapplicable. Thus, the district court's grant of summary judgment on the state law claims against Sever and Miller on the grounds of section 301(b) immunity was in error, and we must reverse.

IV.

CONCLUSION

For the foregoing reasons, we will affirm the district court's entry of judgment for defendants Local 30, Sever, and Miller on Felice's duty of fair representation claim, but we will reverse the grant of summary judgment for defendants Sever and Miller on Felice's state law claims and remand the case for proceedings in accordance with our

opinion. On remand, the district court will have the discretion to retain the case for disposition by it or remand to state court now that there are no longer any federal claims remaining. *See Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 357 (1988); *Henglein v. Informal Plan for Plant Shutdown Benefits for Salaried Employees*, 974 F.2d 391, 398 (3d Cir. 1992).

One half of the taxable appeal costs are to be borne by Felice; the other half by Sever and Miller jointly.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Memorandum Opinion of the United States District Court for the Western District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 89-1183

THOMAS C. FELICE,

Plaintiff,

v.

THOMAS SEVER, individually and in his capacity as President of Teamsters Local Union No. 30; RONALD MILLER, individually and in his capacity as Business Agent of Teamsters Local Union No. 30; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 30; THE COUNTY OF WESTMORELAND; and THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

MEMORANDUM OPINION

Cohill, Chief Judge.

Presently before the Court in this case are two motions for summary judgment—one filed on behalf of Westmoreland County and one on behalf of defendants Thomas Sever, Ronald Miller, and Teamsters Local Union No. 30 ("union defendants"). For the following

reasons, we will deny Westmoreland County's motion and grant the union defendants' motion as to Counts 1, 3, and 5.

Background

Plaintiff Thomas C. Felice previously worked at M&G Convoy where he served as shop steward for the Teamsters, Chauffeurs, Warehousemen & Helpers Local Union No. 30 ("Local 30"). In late 1987, he sought union office as part of a slate of candidates. A rival slate of candidates won the election, including defendant Sever, who was elected president of Local 30, and defendant Miller, who was elected business manager. Plaintiff contends that although he was elected shop steward for a term lasting until May of 1990, defendants Sever and Miller engineered an election in May of 1988 "at such a time and in such a manner as to insure the defeat of Plaintiff Felice." Complaint ¶25. Without the superseniority accorded to a shop steward, plaintiff Felice was laid off from work at M&G Convoy.

Felice later sought work as a park police officer with defendant Westmoreland County. Plaintiff alleges that he was hired by the County and that this fact is evidenced by the required number of County Commissioners' signatures on the form authorizing his hiring. Plaintiff argues that the signing of this form constitutes a valid hire under Pennsylvania law. Defendants contend that plaintiff was accepted for hire contingent upon the approval of Private Industry Council ("PIC") funding for his training as an officer. Approval of PIC funding was apparently dependent upon the signing of a union concurrence form. As it turned out, the union responsible for approving the union concurrence form was none other than the Local 30

controlled by Sever and Miller. The union concurrence form has never been signed and Felice has never been assigned work as a park police officer.

The gravamen of plaintiff's complaint is that defendants Sever and Miller have used their positions at the Local 30 to cause plaintiff the loss of his job at M&G Convoy and to prevent his gainful employment as a Westmoreland County officer in retribution for his opposition to their election as union officers. Plaintiff claims that certain activities on behalf of the union constituted breach of the union's duty of fair representation. He claims that Sever and Miller defamed him with false accusation and utterances during this course of conduct. He alleges that Westmoreland County officials conspired with the union to effectively terminate his employment in retaliation for exercising his First Amendment right to oppose the election of Sever and Miller.

Defendants have now moved for summary judgment. Count VIII of the complaint, dealing with punitive damages, was dismissed earlier in this case.

Summary Judgment

Federal Rule of Civil Procedure 56(c) requires a grant of summary judgment when the moving party has shown "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The United States Supreme Court has said that no genuine issue for trial exists when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The initial burden falls upon the moving party to identify those portions of pleadings, affidavits, depositions, answers to interrogatories, and admissions that it believes establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The nonmoving party, if it is to survive the motion, must then "by affidavits or as otherwise provided in this rule . . . set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

Discussion

After consideration of the applicable briefs, documents, and deposition transcripts, we find that genuine issues of fact remain as to the liability of Westmoreland County, the Local 30, and Sever and Miller in their capacities as union officials. But we rule that plaintiff's complaints against Sever and Miller as individuals are foreclosed under federal law.

In addition to his allegations against Westmoreland County and the union defendants for a constitutional violation, and against the union defendants in their official capacities for breach of the duty of fair representation, plaintiff seeks to recover from Sever and Miller in their individual capacities for these actions. According to Section 301(b) of the Labor Management Relations (Taft-Hartley) Act, in relevant part:

> Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

29 U.S.C. §185(b).

In *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), the Supreme Court held that §301(b) provides an individual union member with immunity from liability in a suit for breach of a collective bargaining agreement. Immunity under §301(b) applies even if the act at issue was not authorized by the union. *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981). Lower courts have held that under *Atkinson*, individual union members are immune from suits seeking money damages for activities arising out of union activities, including suits for breach of the duty of fair representation. *Wilkes-Barre Pub. v. Newspaper Guild of Wilkes-Barre*, 647 F.2d 372 (3d Cir. 1981); *Evangelista v. Inlandboatmen's Union*, 777 F.2d 1390 (9th Cir. 1985); *Bey v. Williams*, 590 F. Supp. 1150 (W.D. Pa. 1984). Thus, plaintiff may not maintain an action against Sever and Miller in their individual capacities for breach of the duty of fair representation.

Likewise, *Atkinson* prohibits plaintiff's state-law defamation claims against Sever and Miller in their individual capacities. "With monotonous regularity, court after court has cited *Atkinson* to foreclose state-law claims, however inventively cloaked, against individuals acting as union representatives within the ambit of the collective bargaining process." *Montplaisir v. Leighton*, 875 F.2d 1, 4 (1st Cir. 1989) (citations omitted). The actions complained of here fall within the ambit of the collective bargaining process. The alleged statements made while plaintiff worked at M&G Convoy concerned union elections. Defamatory remarks allegedly published to Westmoreland County personnel were made, according to plaintiff, after County officials had authorized his hiring and he became covered by the collective bargaining agreement between the Local 30 and the County. A state-law defamation action for any such remarks is thus precluded by federal law.

This Court will therefore grant summary judgment for defendants Sever and Miller as to Counts 1, 3, and 5 since they are directed exclusively to these two defendants. Count 2, seeking judgment against Sever, Miller, and the union, is sufficient to address any liability of Sever and Miller in their official capacities.

An appropriate Order will issue.

MAURICE B. COHILL, JR.
Maurice B. Cohill, Jr.
Chief Judge

Order of the United States District Court for the Western District of Pennsylvania Dated May 22, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 89-1183

THOMAS C. FELICE,

Plaintiff,

v.

THOMAS SEVER, individually and in his capacity as President of Teamsters Local Union No. 30; RONALD MILLER, individually and in his capacity as Business Agent of Teamsters Local Union No. 30; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION No. 30; THE COUNTY OF WESTMORELAND; and THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

ORDER

AND NOW, to-wit, this 22nd day of May, 1991, for the reasons stated in the foregoing Memorandum Opinion, it is ORDERED, ADJUDGED, and DECREED that

summary judgment be and hereby is GRANTED in favor of defendants as to Counts 1, 3, and 5 of the complaint.

MAURICE B. COHILL, JR.
Maurice B. Cohill, Jr.
Chief Judge

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Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Pennsylvania Dated March 11, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 89-1183

THOMAS C. FELICE,

Plaintiff,

v.

THOMAS SEVER, individually and in his capacity as President of Teamsters Local Union No. 30; RONALD MILLER, individually and in his capacity as Business Agent of Teamsters Local Union No. 30, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN HELPERS OF AMERICA, LOCAL UNION NO. 30, and THE COUNTY OF WESTMORELAND,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

LEWIS, District J.

After hearing evidence and argument during a non-jury trial in the above-captioned case, and after having reviewed and considered the parties' post-trial submissions, the court enters the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff Thomas C. Felice was a member of defendant Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 30 ("Local 30") in November, 1988.

2. During the previous year, he had run unsuccessfully for union office on a slate of candidates which opposed Local 30 President Thomas Sever's slate of candidates. Sever's entire slate won the election.

3. Thereafter, Sever instituted a campaign of retaliation against Felice, ranging from keeping a tight rein on Felice's participation in union meetings to attempting to manipulate steward elections in order to deprive Felice of a union office and ultimately of a job.

4. Because of Sever's efforts, Felice lost his position as union shop steward at a company called M & G Convoy in 1988. Consequently, he also lost the "super-seniority" accorded to shop stewards and was laid off in July, 1988. He eventually would have been laid off even if he had the super-seniority, but without it he was laid off earlier than he otherwise would have been.

5. When a member of Local 30 is not employed in a bargaining unit represented by Local 30 for a period of six months, union by-laws require the issuance of an honorable withdrawal card to that member. This terminates the person's active membership in the union, thus depriving him or her of the right to seek union office.

6. During a union executive board meeting in late 1988, Sever stated that as long as he was president of Local 30, Felice would not get a job. In other contexts, even before this, he was heard to say that Felice would never work in Local 30 again.

7. On November 14, 1988, Felice applied for a position with the Westmoreland County Park Police. Local 30 and Westmoreland County (the "County") are parties to a collective bargaining agreement covering park police pursuant to the Pennsylvania Public Employee Relations Act, 43 P.S. §1101.101 *et seq.*

8. County Commissioner Richard Fey Vidmer arranged to hire Felice for a park police position. Felice came to Vidmer's attention through political connections, but Vidmer also saw Felice's hiring as a chance to save the County some money.

9. The County could save money by receiving salary reimbursement from the Private Industry Council of Westmoreland/Fayette, Inc. ("PIC") if it hired Felice.

10. PIC is an entity established pursuant to the Job Training Partnership Act of 1982, 29 U.S.C. §§1501 *et seq.* (the "Act"), the successor to the Federal Comprehensive Employment and Training Act of 1973, 29 U.S.C. §§801 *et seq.* ("CETA"). Pursuant to the Act, PIC could reimburse the County for one-half of Felice's wages during a three-month training period.

11. At all times, Vidmer intended that Felice only be hired if the County received reimbursement from PIC.

12. Vidmer ensured that all of the County paperwork necessary for Felice to be hired was completed. To that end, his assistant obtained the signatures of the other two County commissioners on a personnel action form. All other required signatures were obtained, and all information necessary for Felice to be hired except for the effective date of the action was provided. The space in which the effective date was to be provided was left blank.

13. Although PIC funding was not a written condition of employment, and although all of the necessary paperwork had been completed, Felice's obtaining the job as a park policeman was contingent upon the County's obtaining PIC funding.

14. Pursuant to agency regulations, PIC required that Local 30, as the park police bargaining unit representative, execute a union concurrence form before it would provide such funding to the County.

15. Park Police Chief Michael Corsaro forwarded the union concurrence form to Local 30 business manager Ronald Miller on November 17 or November 18, 1988.

16. After receiving the union concurrence form, Miller showed it to Sever, who directed that the union concurrence form be sent to the union's attorney for review. Sever did this despite the union's business managers having received and signed similar forms in the past without even receiving approval from him. For example, former business manager Ken Minkus testified that he signed many CETA forms, which were similar but less detailed than the PIC form, without Sever's approval. He never saw a CETA form held up for more than thirty (30) days.

17. Between late November, 1988 and early December, 1988, Felice inquired several times as to why Local 30 had not yet signed the PIC form. He expressed concern about the union's delay.

18. During this time, Miller offered a variety of excuses for the delay. They ranged from his saying that Sever would not permit him to sign and return the form to his asserting that Local 30 would not sign the form until a grievance which was currently pending with the County was resolved to his expressing some concern about the wage rate which Felice would be paid.

19. In late December, 1988, the attorney for Local 30 indicated that signing the PIC form would be appropriate as long as the County assured the union that its hiring Felice would not result in the layoff of any bargaining unit employee.

20. In early January, 1989, Miller contacted Corsaro and requested such an assurance from the County.

21. Rather than providing such assurance, Corsaro responded with a memorandum addressed to Sever dated February 6, 1989. In the memorandum, he stated that the County believed that a recent change in state law prevented it from hiring Felice because Felice neither had completed nor was enrolled in municipal police training. Therefore, Local 30's signature on the PIC union concurrence form was no longer needed.

22. On January 31, 1989, Local 30 issued Felice an honorable withdrawal card because he had not been employed within the local for six months.

23. Since then, Felice has obtained other employment, but not within a bargaining unit represented by Local 30.

24. Had Felice been employed as a County park police officer beginning on November 14, 1988, he would have earned $61,972.00 in wages through the present.

25. He has received $35,470.84 in wages from his other job during that time period.

CONCLUSIONS OF LAW

Plaintiff originally asserted this case against Local 30 and the County, alleging two §1983/§1985 claims—one against the County and one against Local 30—and a hybrid duty of fair representation claim in which plaintiff

argued that the County breached its collective bargaining agreement with him and that Local 30 breached its statutory duty to represent him fairly. At the close of plaintiff's case, the court granted the County's motion for judgment as a matter of law, thus dismissing all claims against the County. Because of lack of a "state actor," the §1983/§1985 claim against Local 30 was also dismissed at that time. Therefore, remaining for this court to decide is the plaintiff's allegation that Local 30 breached a duty of fair representation it owed to him.

It is undisputed that a labor organization has a statutory duty to fairly represent all of its members in collective bargaining and in its enforcement of the resulting collective bargaining agreement. Under the fair representation doctrine, a union's statutory authority as the exclusive bargaining agent includes an obligation to serve the interests of all bargaining unit members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).[1]

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[1] *Vaca* is, of course, premised on federal labor law principles. In its renewed motion for judgment as a matter of law filed after trial, Local 30 claims that, because the County is a political subdivision of the Commonwealth of Pennsylvania, it is not an "employer" within the meaning of section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. §185. *See Crilly v. Southeastern Pennsylvania Transportation Authority*, 529 F.2d 1355 (3d Cir. 1976). Therefore, Local 30 argues that any labor law claims against it based upon Felice's attempts to obtain County employment would be governed by Pennsylvania labor law.

The court need not address this argument in light of its holding that Felice cannot recover under federal labor law because the union owed him no duty in the circumstances set forth above.

It is similarly undisputed that a union must act with a bad-faith motive in order to breach its duty of fair representation. *Medlin v. Boeing Vertol Co.*, 620 F.2d 957, 961 (3d Cir. 1980). Indeed, "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." *Vaca*, 386 U.S. at 190.

Without a doubt, Local 30, through Sever and Miller, acted in bad faith. Felice's current employment at a job which pays less than the job he would have had with the County, as well as his losing his membership in the union (which sparked another lawsuit currently pending before the United States Court of Appeals for the Third Circuit), both stem from Sever's deliberate decision to make life difficult for Felice. It is apparent to the court that Sever consciously decided that Felice had voiced his opinion regarding union affairs and had opposed Sever's views one too many times. Therefore, in order to punish Felice, Sever set out on a wholly unwarranted campaign to prevent Felice from working within Local 30, and thus eventually from being a member of the local.

Consistent with this campaign, after a long series of attempts to injure Felice in his employment, Local 30 delayed approval of the PIC union concurrence form just long enough to prevent Felice from being hired by the County because of the County's interpretation of a change in the law. While doing so, Sever and Miller offered Felice a variety of excuses for their tardiness, each designed to lure him into believing that they were working toward granting the necessary concurrence.

This is the sort of practice which the federal courts and our system of laws should guard against. Union officials should not be permitted to engage in such bullying

tactics as they pursue personal vendettas against members such as Felice, who merely seek to exercise their rights. Indeed, this court simply cannot exaggerate its frustration at being unable to redress the harm inflicted on a well-meaning, upstanding individual who merely sought a better employment opportunity. This was a measurable harm borne out of the sheer arrogance of a powerful union leader who flagrantly abused the authority entrusted to him in order to punish a dissenting voice.

Regrettably, however, if a federal remedy exists, it does not appear to arise under the currently existing federal case law regarding the duty of fair representation. As despicable as Sever's conduct—and the conduct of those surrounding him, such as Miller—was, the court cannot hold that Local 30 owed a duty of fair representation to Felice with regard to signing the union concurrence form.

I. The Duty of Fair Representation

A brief examination of the background of the duty of fair representation is necessary in order for the parties to understand the dilemma in which this court finds itself.

The duty of fair representation imposed upon unions by the courts derives from the union's status as exclusive bargaining representative for employees under federal labor law. *Breininger v. Sheet Metal Workers,* 493 U.S. 67, 86-87 (1989). As previously noted, the duty requires the union to represent all employees fairly in collective bargaining and in enforcement of the collective bargaining agreement. *Vaca,* 386 U.S. at 177. *See also Breininger,* 493 U.S. at 88 (unions must fairly negotiate and administer collective bargaining agreements).

The duty of fair representation has been described as serving as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca*, 386 U.S. at 182, *cited in Breininger*, 493 U.S. at 87. Despite this, however, there are limits to the situations in which unions owe members a duty of fair representation. As a judicially created counterbalance to the union's power as collective bargaining unit representative, the duty applies only when the union is acting with regard to negotiation, administration or enforcement of provisions of the collective bargaining agreement. *See generally* M. Malin, *Individual Rights Within the Union* at 418-19 (1988).

II. Local 30 Owed No Duty to Felice

Local 30 argues that it owed no duty to the plaintiff because plaintiff was never hired by the County. It argues that its duty of fair representation extends to members of a bargaining unit, with regard to matters related to the collective bargaining agreement, its interpretation, negotiation and administration, not to members of the union such as Felice who may well be seeking to become members of a bargaining unit. *See, e.g., id.* at 428-29.

Some courts have held that a union only owes a duty of fair representation to members of a bargaining unit. *See McTighe v. Mechanics Educational Society of America, Local 19*, 772 F.2d 210 (6th Cir. 1985) (no duty owed to a supervisor who was not a member of the collective bargaining unit); *Karo v. San Diego Symphony Orchestra Association*, 762 F.2d 819 (9th Cir. 1985) (no duty owed to an applicant for employment); *Cf. Woosley v. Avco Corp.*, 944 F.2d 313 (6th Cir. 1991) (supervisors,

although not usually members of bargaining unit, owed a duty because language in the collective bargaining agreement effectively provided that they were members of the unit).

Authority exists for the proposition that the union's duty of fair representation sometimes extends to persons not currently employed in the bargaining unit, however. *See, e.g., Breininger,* 493 U.S. 67 (duty to operate a hiring hall fairly owed to both members and non-members of the bargaining unit); *Lewis v. Local Union No. 100, Laborers' International Union of North America,* 750 F.2d 1368 (7th Cir. 1984) (duty to operate hiring hall fairly); *Nedd v. United Mine Workers of America,* 556 F.2d 190 (3d Cir. 1977) (once union elects to bargain regarding future retiree benefits, union has a duty to fairly safguard retirees' interests).

In these cases, however, the unions were acting with respect to negotiation, administration or interpretation of a collective bargaining agreement. In *Breininger,* for example, the court imposed a duty to fairly operate a hiring hall on a union which had agreed in its collective bargaining agreement to establish the hiring hall. "[T]he key," the court noted, "is that the union is administering a provision of the contract, something that we have always held is subject to the duty of fair representation." *Breininger,* 493 U.S. at 88. *See also Lewis;* 750 F.2d at 1371 n.1, 1376.

Even in *Nedd,* in which the United States Court of Appeals for the Third Circuit discussed "the need to place limitations upon the power of the recognized bargaining representative to injure minorities inside and outside the bargaining unit," the duty which the court

found revolved around matters which were the subject of negotiation in a collective bargaining agreement. *Nedd*, 556 F.2d at 200.[2]

In contrast, in this case, Local 30's signature on a concurrence form was not required by virtue of the collective bargaining agreement between the County and Local 30. Rather, federal regulations require that the local's consent be obtained before PIC provides funding for an employee.

The only provision of the collective bargaining agreement cited by plaintiff which might give rise to a duty to sign the concurrence form fairly is Article III, Section 1. In that section, Local 30 agrees "to admit all employees to membership and to represent all employees without regard to race, color, creed, national origin, handicap, age or sex, or the proper exercise by an employee of his rights." This general provision does not expand the union's duties under the collective bargaining agreement. Rather, it provides that the union will not discriminate in representing County employees pursuant to or in connection with the agreement. The union's signing the PIC concurrence form is not required by or incident to administration or negotiation of the collective bargaining agreement.

Of course, Local 30's signature on the concurrence form is required solely because Local 30 is the exclusive bargaining unit representative for County park police

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[2] In addition, the applicability of the court's decision in *Nedd* to the decision in this case is somewhat in question because of factual differences between the two cases. The union in *Nedd* controlled certain pension funds, which resulted in its acting as a fiduciary with respect to those funds and thus arguably owing greater duties than would be imposed on unions in most cases. *Ambromovage v. United Mine Workers of America*, 726 F.2d 972, 975 (3d Cir. 1984).

under the collective bargaining agreement. Therefore, plaintiff argues, rather convincingly, that Local 30 was in a position to injure Felice solely because of the collective bargaining agreement. Despite this, under the circumstances at issue Local 30 owed a duty to those currently employed within that bargaining unit. Those persons who were park police when Local 30 was considering whether to sign the PIC concurrence form are the ones to whom Local 30 owed a duty. *See Breininger*, 493 U.S. at 88 (union must exercise its authority fairly "because the members of the bargaining unit have entrusted the union with the task of representing them").

The court has examined each case cited by plaintiff in the hopes that it would be able to rectify the injustice done to Felice in this case. In some of those cases, the existence of a duty was simply assumed. Without the issue having been raised, the court cannot presume that the assumption in those cases that a duty existed was correct.

Moreover, each case cited by plaintiff in which the existence of a duty was discussed comes within the above-described parameters of the duty of fair representation as developed by the courts thus far. *See e.g., Maoilo v. Klipa*, 655 F. Supp. 1139 (W.D. Pa. 1987) (union owes a duty to conduct an advisory vote fairly because such a vote is incident to negotiation of a collective bargaining agreement). The case at bar simply does not.

"Though the duty of fair representation is broad, not all union practices have a substantial impact upon members' rights in relation to the negotiation and administration of the collective bargaining agreements." *Retana v. Apartment, Motel, Hotel and Elevator*

Operators Union, Local No. 14, 453 F.2d 1018, 1024-25 (9th Cir. 1972) (duty implied in conduct of internal union affairs because the matters at issue related to negotiation and administration of the collective bargaining agreement).

Regrettably, the court cannot find for Felice based upon current case law, despite its earnest desire to do so.

An appropriate order will follow.

Date: March 11, 1992

TIMOTHY K. LEWIS
Timothy K. Lewis
United States District Judge

cc: Alex E. Echard, Esquire
Ernest B. Orsatti, Esquire
James F. Israel, Esquire

Order of the United States District Court for the Western District of Pennsylvania Dated March 11, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 89-1183

THOMAS C. FELICE,

Plaintiff,

vs.

THOMAS SEVER, individually and in his capacity as President of Teamsters Local Union 30; RONALD MILLER, individually and in his capacity as Business Agent of Teamsters Local Union No. 30, THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN HELPERS OF AMERICA, LOCAL UNION NO. 30, and THE COUNTY OF WESTMORELAND,

Defendants.

ORDER

AND NOW, this 11th day of March, 1992, following a non-jury trial in the above-captioned case,

IT IS HEREBY ORDERED that the court finds for the defendants Thomas Sever, Ronald Miller and International Brotherhood of Teamsters, Chauffeurs,

Warehousemen and Helpers of America, Local 30. Judgment shall be and hereby is entered in favor of these defendants and against plaintiff Thomas C. Felice.

TIMOTHY K. LEWIS
Timothy K. Lewis
United States District Judge

cc: Alex E. Echard, Esquire
Ernest B. Orsatti, Esquire
James F. Israel, Esquire

CERTIFICATE OF SERVICE

I do hereby certify that on this 12th day of June, 1992, I have served a true and correct copy of the foregoing APPENDIX FOR BRIEF FOR APPELLANT FELICE via first class U.S. mail, postage prepaid, and also Certified Mail, Return Receipt Requested upon the following:

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